...art, U. S.
...LED
MAY 29 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

..... Term, 1976

No. 75-1738

FRANK JOSEPH ROSA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HAROLD GONDELMAN,
BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG,

Attorneys for Petitioner,

10th Floor, Frick Building,
Pittsburgh, Pa. 15219,
(412) 562-8718.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON, SENIOR REPRESENTATIVE
HAROLD L. BERKOBEN, REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15217
412-881-7468

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	14
Exhibit "A"	16
Exhibit "B"	20
Appendix "A"—Judgment of the United States Court of Appeals for the Third Circuit	23
Appendix "B"—Denial of the Petition for Rehearing	25
Appendix "C"—Memorandum Opinion Dated October 29, 1975	26
Appendix "D"—Memorandum and Order Dated May 19, 1975	59

CITATIONS.

Cases.

Rewis v. United States, 401 U.S. 808 (1971)	12
United States v. Bass, 404 U.S. 336 (1971)	12
United States v. Berrigan, 482 F.2d 171 (C.A. 3, 1973)	9
United States v. Enmons, 410 U.S. 396 (1973)	12
United States v. Jacobs, 451 F.2d 530 (C.A. 5, 1971)	12
United States v. Joe, 452 F.2d 653 (C.A. 10, 1972)	9
United States v. Local 807, 315 U.S. 521 (1942)	12

Page

United States v. Padilla, 374 F.2d 782 (C.A. 2, 1967). 10
United States v. Starks, 515 F.2d 112 (C.A. 3, 1975) 11,12

Constitution.

United States Constitution, Commerce Clause, Article I, Section 8, Clause 3 3

Statutes.

18 U.S.C. §1951 (Hobbs Act) 2,3,4,5,6,7,9,11,12
28 U.S.C. §515 4,13,14
28 U.S.C. §1254 (1) 2

Miscellaneous.

64 Georgetown Law Journal 173, 177 12,13

IN THE

Supreme Court of the United States

..... Term, 1976

No. .....

FRANK JOSEPH ROSA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Frank Joseph Rosa, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit entered in this case on April 7, 1976 (Appendix "A" hereto), and the denial of the petition for rehearing dated May 3, 1976, (Appendix "B").

Opinions Below

The opinion of the trial court dated October 29, 1975, a copy of which is appended hereto and marked Appendix "C", has not been printed by any official or unofficial reporter. The United States Court of Appeals for the Third Circuit entered a judgment order without opinion dated April 7, 1976, affirming the judgment of the District Court, a copy of said Judgment Order being appended hereto as Appendix "A". The Court of the Appeals for the Third Circuit denied a petition for rehearing on May 3, 1976, a copy of said order

being attached hereto as Appendix "B". The trial court also filed a Memorandum and Order dated May 19, 1975 denying this petitioner's motion to dismiss and for a severance, a copy of which is attached hereto as Appendix "D".

Jurisdiction

The Judgment of the Court of Appeals was entered on April 7, 1976 (see Appendix "A" hereto) and the denial of the petition for rehearing was entered May 3, 1976 (Appendix "B" hereto). This petition for certiorari was filed within thirty days of the date of the denial of the petition for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Where there is no evidence of a threat or act by the petitioner which would constitute a threat and no money is paid, and the indictment charges the offense of extortion as extortion is defined in the Hobbs Act, is the evidence sufficient to create any factual issue as to the guilt or innocence of petitioner to be decided by a jury?

2. Where the court has defined the Hobbs Act as prohibiting attempted extortion which would attempt to interfere with interstate commerce where there is no evidence of extortion or interference with interstate commerce, has the court expanded the Hobbs Act to cover a situation never intended by Congress?

3. Should petitioner's motion to quash have been granted where the letter of commission for the strike force attorney did not specifically limit his authority as required by the statute?

Constitutional and Statutory Provisions Involved

1. The United States Constitution, Commerce Clause, Article I, Section 8, Clause 3:

> "The Congress shall have the Power . . . to regulate Commerce . . . among the several states . . .".

2. 18 U.S.C. § 1951 (Hobbs Act):

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or by movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000.00 or imprisoned not more than twenty years, or both.
>
> "(b) As used in this section—
>
> (1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside

such State; and all other commerce over which the United States has jurisdiction.

"(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-101, 151-166 of Title 29 or sections 151-188 of Title 45."

3. 28 U.S.C. § 515:

"(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

"(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than $12,000."

Statement of the Case

Petitioner Rosa was charged in a two-count indictment with conspiracy and violation of the Hobbs Act, 18 U.S.C.A. § 1951, together with co-defendants Mannella and Sica. All were convicted on the charge of extortion and Rosa was sentenced to imprisonment for a period of five years, eligible for parole at the end of one year, and a $10,000.00 fine.

The indictment charged that Rosa "did unlawfully attempt to obstruct, delay and affect interstate commerce, . . . by

extortion as the term 'extortion' is defined in and by Section 1951, Title 18, United States Code; . . .". The uncontradicted testimony of the contractor Vaccarello established that petitioner Rosa neither by his presence nor by anything that he said at the only meeting which Rosa had with Vaccarello constituted a threat or an attempt to get money from Vaccarello.[1]

There is no testimony in this record of any commission or threat of physical violence to any person or property in furtherance of a plan or a purpose to do anything in violation of the Hobbs Act. The contractor testified that at a subsequent meeting with a co-defendant Mannella, Mannella demanded a payment of $10,000.00 if Vaccarello was to obtain a park project in the Borough of Monroeville, a political entity in Allegheny County, Pennsylvania. Vaccarello testified that the money was not paid; that he was awarded the contract and that he performed the contract (R. 142a-145a; 204a-205a; 297a). Vaccarello further testified that he never saw Rosa

---

[1] The exact testimony of this witness is as follows:

"Q. During that meeting did Joe Rosa do or say anything to you which made you afraid?

A. No, sir.

Q. Either by his presence or anything he said to you?

A. No, sir.

Q. Did Mr. Rosa himself there at any time make any threats or say anything to you which would indicate to you that Mr. Rosa was attempting to get money from you?

A. No, sir.

Q. Now, as I understand it, that is the only time you saw Mr. Rosa?

A. Yes (203a, 204a)."

The Witness further testified as follows:

"Q. The only time that you were in his (Rosa's) presence where a meeting took place was on July 23?

A. Right.

Q. The only time you talked to him personally was on July 21 *(sic)* (23)?

A. Yes.

Q. Actually, he said very little to you on July 21 *(sic)* (23)?

A. Right."

other than at the morning meeting at which he was not asked for any money and that Rosa never made any demands or threats to him of any kind.

At the conclusion of the government's testimony, Rosa moved for a directed verdict, which was denied. A written motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure was presented stating, *inter alia,* that there was no evidence from which a jury could find Rosa guilty of extortion or attempt to commit extortion as the term is defined in the Hobbs Act (R. 28a; 327a). The conspiracy count had been dismissed so that only the substantive offense remained. The trial court denied the motion for judgment of acquittal and the defendant Rosa rested and renewed his motion (R. 369a). When that motion was denied, Rosa requested that his case be submitted to the jury then since there was no further evidence to be presented which a jury could consider against him. That motion was denied.

The trial court instructed the jury that to convict Rosa of attempted extortion the jury would have to find (a) that he intentionally went to co-defendant Mannella's office to participate in a plan to obtain money from Vaccarello by use of threats and (b) that part of the plan was that Mannella was to be the spokesman for Rosa (although there was no evidence of either (a) or (b)), and (c) that Rosa intended the threat to be real at the second meeting, when he was not present (although there was no evidence which would permit such a finding to be made), and other facts as to the belief of the contractor which are not here pertinent. The trial court in denying the subsequent motion for arrest of judgment or new trial detailed evidence relating to Mannella and Sica (R. 708a) but as to Rosa simply said that the evidence was also sufficient against him without setting forth any evidence since there was none (R. 709a).

Reasons for Granting the Writ

The trial court submitted issues to the jury which, as a matter of law, would not constitute a violation of the Hobbs Act or permit a jury to find a violation of the Hobbs Act had occurred. The following facts merit special attention in this case:

1. There is no evidence that Rosa said or did anything which would constitute a threat under the Hobbs Act. (R. 203a, 204a, 215a).

2. The indictment charges that the offense committed was extortion as "extortion" is defined in the Act and yet the uncontradicted evidence is that no money was obtained and no threats of violence to person or property were made so that there was no crime of extortion proved.

3. Courts have loosely defined the crimes created by the Hobbs Act as including extortion and attempted extortion when the definition of "extortion" under the Act does not include an attempt and in the Federal system unless attempt is made a specific crime by an Act of Congress, it is not a crime.

4. The trial court charged the jury that this was a case of attempted extortion to attempt to interfere with interstate commerce, which is not a crime created by the Act of Congress.

5. The grammatical construction of the Act is such that actual extortion which may attempt to interfere with interstate commerce is the substantive crime set forth in the Act.

6. If a threat or commission of violence to person or property is committed, that is an offense under a separate

section of the Hobbs Act but not under the secton of extortion "as extortion is defined in the Act", which is the offense charged in the indictment.

7. There was no testimony that if Vaccarello had been required to pay the money it would have come from a source which would have affected or attempted to have affected interstate commerce in any manner, shape or form.

Petitioner Rosa contends that there was no evidence from which a jury could find his guilt. The trial court properly charged the jury that the elements which they had to find in order to convict included a state of mind and an agreement on the part of Rosa that a discussion in Mannella's office, held at a subsequent time, would result in a demand for money. This was specifically controverted by the only testimony offered by the government and Mannella's testimony in defense could not be considered as to petitioner Rosa. The trial court in ruling on this motion (R. 709a) stated:

> "Rosa's argument is fatally defective in its interpretation of the conclusions which the jury could draw *from his presence* in Mannella's office during the morning meeting." (emphasis added)

The elements which the Court outlined must be present here—that Rosa went to Mannella's office with the intent to extort money and to make certain threats. There was no evidence of Rosa's participation or knowledge of such a scheme but the Court below nevertheless stated:

> "We disagree since we find that the jury could conclude on the basis of all the evidence that Rosa had associated himself with the extortion scheme and like Sica, had appointed Mannella as his spokesman. While the evidence of Rosa's participation is entirely circumstantial, it is sufficient to sustain the conviction." (R. 710a)

The court has not detailed any specific act or statement or conduct which would permit a jury to find Rosa guilty other than his mere presence at the alleged meeting because there was absolutely none.

The language of the Hobbs Act establishes the crime of affecting commerce or attempting to affect commerce by robbery or extortion or the commission or threat of physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of the Act.

From the standpoint of pure English grammar, the phrase "or attempts or conspires so to do" refers to commerce and not to extortion. In addition to the grammatical construction of the sentence, it is submitted that when Congress intends to include the attempt to commit a crime in its definition of substantive offenses, it knows how to do so. Exhibit "A" attached to this brief refers to many of the criminal statutes which make a substantive offense or *an attempt to commit a substantive offense* a crime.

In *United States v. Berrigan*, 482 F.2d 171 (C.A. 3, 1973), the Court of Appeals for the Third Circuit reviewed the law generally and stated, at page 185:

> "Federal criminal law is purely statutory; there is no federal common law of crimes."

The Court also held that the National Commission on Reform of Criminal Laws recognizes the void in the existing federal criminal code and has proposed

> "... a general attempt statute, applicable to every federal offense."

In *United States v. Joe*, 452 F.2d 653 (C.A. 10, 1972), the defendant was charged with the offense of rape on an Indian reservation. The statute provides that the offense of rape shall be defined in accordance with the laws of the state in

which the offense is committed. The defendant argued that he was entitled to a charge on "attempted rape". The Court of Appeals, in dismissing this contention, held that the "attempted rape" instruction should not have been given because:

> "The only attempts to commit crimes which are made federal crimes are those specifically so prescribed by federal law. United States v. Padilla, 374 F.2d 782 (2nd Cir. 1967). Attempted rape is not listed in 18 U.S.C. §1153."

In the *Padilla* case, cited above, the Second Circuit held that, in footnote 7, Padilla could not have been convicted of an attempt to violate the particular section because attempt was not made a substantive offense in the statute. The Court of Appeals also held in this footnote that Federal criminal statutes contain no general attempt provision,

> "... and an attempt to commit a federal crime is punishable only where the section defining the crimes specifically includes an attempt within its proscription."

The Court then cited several statutes, although not as many as included in Exhibit "A" attached to this petition, indicating the congressional awareness of how to make an attempt a crime.

Rule 31 (c) of the Federal Rules of Criminal Procedure does not aid in the decision of this issue since the rule simply provides that a defendant may be found guilty of an offense included in the offense charged.

> "... or of an attempt to commit either the offense charged or an offense necessarily included therein *if the attempt is an offense.*" (Emphasis added)

The indictment in this case specifically charges the crime committed by this petitioner as extortion as "extortion" is defined in the Act. The only definition of extortion is set

forth in subparagraph (b) of Section 1951, 18 U.S.C. and in that definition attempted extortion is not included. Extortion, as defined in the Act, means:

> "The *obtaining* of property from another, with his consent...". (Emphasis added)

The definition limits the crime to actual obtaining of property from another because the verb "induced" can only have meaning if the property is actually obtained. The uncontradicted evidence in this case is that the witness Vaccarello did not pay any money and/or the defendants did not obtain the property of another with his consent. The proof in this case, therefore, certainly does not establish the crime of extortion.

If the crime defined by the Court below in its charge is the crime defined by §1951, then the Act is void for vagueness. To sustain the Court's charge it is necessary to find that Congress made it a crime to attempt to affect commerce by an attempt to extort. The word "attempt" in the phrase "attempt so to do" cannot modify "commerce" and "extortion". See Exhibit "B" attached to this petition.

Counsel recognizes that there are cases which loosely discuss the Hobbs Act and state, without any analysis of the Act itself, that there is a crime of attempted extortion. In *United States v. Starks*, 515 F.2d 112 (C.A. 3, 1975), the Circuit held that the Hobbs Act proscribes a number of separate offenses: (1) "robbery"; (2) "extortion"; (3) "attempted robbery or extortion" and (4) "conspiracy to commit robbery or extortion". Every case which petitioner's counsel has been able to find in which money has not been obtained but has resulted in a conviction of extortion involves the commission or threats to commit physical violence to person or property, which is a separate substantive crime established by the Hobbs Act over and above the crimes labeled "robbery" or

"extortion". *United States v. Jacobs*, 451 F.2d 530 (C.A. 5, 1971), as well as *United States v. Starks, supra* discuss the Hobbs Act as creating the crimes of robbery, extortion, attempted robbery or extortion and conspiracy to commit robbery or extortion without relating the *obiter dicta* in the Court opinion to either the statute or to the indictment.

In this case the indictment charges extortion as "extortion is defined in the Act". Extortion as defined in the Act does not include attempted extortion. The evidence in this case proved that there was no extortion. Therefore, the substantive crime charged in the indictment and established by the statute failed of proof.

The District Court traced the history of the Hobbs Act in its opinion. It also cited *United States v. Local 807*, 315 U.S. 521 (1942), which held that terrorist activities were excluded from the scope of the 1934 Act and that thereafter the Act was codified. It is respectfully submitted, however, that the Court below has given the Hobbs Act its widest possible meaning in order to encompass the facts of this case. This is contrary to *Rewis v. United States*, 401 U.S. 808 (1971); *United States v. Bass*, 404 U.S. 336 (1971), and *United States v. Enmons*, 410 U.S. 396 (1973). It is also respectfully submitted that the Court below and the Court of Appeals for the Third Circuit have adopted the wishes of the Assistant Attorney General in charge of the criminal division of the United States Department of Justice who, in volume 64 Georgetown Law Journal 173, stated:

> "The new federal effort requires imaginative and innovative approaches to the body of federal criminal law, often extending previous jurisdictional parameters to cover new factual situations. Of interest in the federal appellate courts during the term dealt with in this year's Note is the treatment given to some of these new approaches. Particularly noteworthy are those cases that

involve the expansive and imaginative use of federal criminal jurisdiction to reach state and local official misconduct that places even an indirect burden on interstate commerce...".

Page 177:

"Each of these decisions represents an innovative application of existing federal statutes to obtain convictions in cases involving official or institutional corruption. We are not unmindful that there has been and continues to be some concern over the expansion of federal auxiliary jurisdiction, especially into matters in which there should be strong state interest or responsibility. The court in each of the foregoing cases, however, found a sufficient federal interest to support prosecution."

Although this is the expressed wish of the executive department of the government, it is contrary to the time-honored rule of strict construction of criminal statutes as well as the time-honored limitations of federal encroachment into state activities.

In holding that 28 U.S.C. §515 authorizes the commissioning of Strike Force attorneys who may appear before grand juries and prosecute federal cases, the lower Court decided an important question of federal law which has not been but should be settled by this Honorable Court.

Before trial, all counsel filed motions to quash because grand jury proceedings were conducted by Strike Force attorneys. In recent months, the authority of Strike Force attorneys to conduct grand jury proceedings has been the subject of extensive litigation, the results of which have, for the most part, upheld their authority. And Judge McCune so held. See generally, Appendix "C".

Petitioner submits that Strike Force attorneys may not appear before a grand jury because their letters of commission do not comply with statutory requirements.

28 U.S.C. §515 requires that the letter of commission *specifically* describe the particular type of case which it is authorized to investigate. This element of specificity is conspicuous by its absence in the letter of commission in the instant case. Said letter gives Special Assistants a vague but for all practical purposes, unlimited authority to investigate any violation.

Not only do the letters of commission in the instant case not comply with statutory requirements, but petitioner submits that Congress, in enacting the enabling legislation in 1906, never intended to authorize the creation of independent filed offices thereafter by Special Assistants to the Attorney General, each of whose authority is identical to a United States Attorney. At best, as described in the legislative history of the Act, all that Congress intended was to authorize the retention of highly skilled and knowledgeable counsel to represent the government in special and/or complex cases. For these reasons, petitioner submits that the trial court improperly denied the motion to quash the indictment.

Conclusion

It is respectfully submitted that no case can be found in which federal jurisdiction has attached and a conviction been upheld where (1) no money was paid; (2) no governmental or official action was taken; (3) no governmental or official action was withheld; (4) no governmental official was involved; (5) no union official was involved; (6) no contract was interfered with; (7) no act was committed or threatened which would do violence to person or property; (8) no interference with interstate commerce was even indicated, and (9) no attempt to interfere with interstate commerce was even indicated.

For these reasons, a writ of *certiorari* should issue to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

HAROLD GONDELMAN,
BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG,
Attorneys for Petitioner.

Exhibit "A"

CRIMES UNDER 18 USC

1. 18 USC 81

Whoever, within the special maritime and territorial jurisdiction of the United States, willfully and maliciously sets fire to or burns, or attempts to set fire to or burn any building, structure or vessel, ...

2. 18 USC 224

(a) Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, ...

3. 18 USC 351

(a) Whoever kills any individual who is a Member of Congress ...

(b) Whoever kidnaps any individual designated in subsection (a) ...

(c) Whoever attempts to kill or kidnap any individual designated ...

4. 18 USC 542

Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, ...

5. 18 USC 752

(a) Whoever rescues or attempts to rescue or instigates, aids or assists the escape, or attempt to escape, of any person arrested upon a ...

(b) Whoever rescues or attempts to rescue or instigates, aids, or assists the escape or attempted escape of any person in the custody of the Attorney General or his authorized representative, ...

6. 18 USC 754

Whoever, by force, rescues or attempts to rescue, from the custody of any marshal or his officers, the dead body of an executed offender, ...

7. 18 USC 872

Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempt an act of extortion ...

8. 18 USC 1113

Except as provided in section 113 of this title, whoever, within the special maritime and territorial jurisdiction of the United States, attempts to commit murder or manslaughter, ...

9. 18 USC 1509

Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, ...

Exhibit "A".

10. 18 USC 1952

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), ...

11. 18 USC 2101

(a) Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent—

(A) to incite a riot; or

(B) to organize, promote, encourage, participate in, or carry on a riot; or

(C) to commit any act of violence in furtherance of a riot; or

(D) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot;

and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C), or (D) ...

Exhibit "A".

12. 18 USC 2113

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, ...

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, ...

* * *

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, ...

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, ...

13. 18 USC 2115

Whoever forcibly breaks into or attempts to break into any post office, or any building used in whole or in part as a post office, ...

14. 18 USC 2511

(1) Except as otherwise specifically provided in this chapter any person who—

(a) wilfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication: ...

Exhibit "B"

DUQUESNE UNIVERSITY
Pittsburgh, Pennsylvania
15219

English Department

August 29, 1975

Harold Gondelman, Esquire
Frick Building
Pittsburgh, Pennsylvania 15219

Dear Mr. Gondelman:

We have conferred at length on a grammatical and/or linguistic analysis of the following text which you directed to our attention:

> "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or threatens or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

and freely offer the following observations:

As the sentence stands, the phrase "attempts or conspires so to do" can refer *only* to the verbs "obstruct," "delays" and "affects" and their complements. This reference is made evident by the infinitive "to do" modified by "so." Such a construction cannot linguistically refer to the nouns "robbery" and "extortion."

The statement, in its given form, in light of its eccentric punctuations and structure, cannot be construed to present a

clear meaning nor is it intelligible grammatically, unless and until the phrase "so to do" is expanded and clarified. Since "to do" is an infinitive form completing the two verb phrases "attempts (to do)" and conspires (to do)," the only possible expansions or substitutions for "to do" are infinitive forms. Infinitive forms in English *must* consist of the word "to" followed by a verb—never a noun. Hence, were the sentence to be restructured for clarification, it must necessarily read: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by robbery or extortion, *or* whoever in any way or degree *attempts to obstruct, to delay* or *to affect* commerce or the movement of any article or commodity in commerce, by robbery or extortion . . ."

Clearly, then, grammatically the sentence refers to obstructing, delaying, or affecting commerce, etc., or *attempting to* obstruct, delay, or affect commerce, etc., or *conspiring to* obstruct, delay, or affect commerce, etc., *by* robbery or extortion: grammatically, the sentence makes no reference to attempts *at* robbery or extortion.

We express no opinion regarding the intent of the framer of this statutory test.

HERBERT H. PETIT,
Herbert H. Petit, Ph.D.,
Professor, English Philology.

JEROME L. NIEDERMEIER, Ph.D.,
Jerome L. Niedermeier, Ph.D.,
Associate Professor,
English Literature and Linguistics.

JAMES P. BEYMER,
James P. Beymer, M.A., J.D.,
Chairman, English Department.

Exhibit "B".

DUQUESNE UNIVERSITY
Pittsburgh, Pennsylvania
15219

English Department

Dr. Herbert H. Petit: A.B., Transylvania College; M.A., University of Kentucky; Ph.D., Western Reserve University; professor of English Philology at Duquesne University since 1958, Dr. Petit regularly teaches courses in language and linguistics at graduate and under-graduate levels. He is a member of the Linguistic Society of America and American Dialect Society as well as the Modern Language Association and the Modern Humanities Research Association and Who's Who in America. He is also editor of *Annuale Mediaevale*, a professional journal devoted to publications in the field of Middle English language and linguistics, and a member of the Monograph Committee of MHRA.

Dr. Jerome L. Niedermeier: B.A., University of Pittsburgh; M.A., Ph.D., Duquesne University; Dr. Niedermeier is an associate professor of English at Duquesne University where he has been a member of the faculty since 1964. During this period he has regularly taught courses in the history of the English language and applied linguistics. Dr. Niedermeier's dissertation was titled *A Structured Approach to Engligh Composition* and was wholly concerned with linguistic analysis as a basis for improving writing skills.

Mr. James P. Beymer: A.B., University of Notre Dame; M.A., Duquesne University; J.D., University of Pittsburgh. Mr. Beymer is an associate professor of English at Duquesne University where he has served as chairman of the English Department since 1972. Prior to his term as chairman, he was for ten years a regular teacher of language and literature courses in the department.

APPENDIX "A"

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2382

UNITED STATES OF AMERICA,

v.

FRANK JOSEPH ROSA a/k/a "JOE", JOSEPH SICA, VINCENT MANNELLA,
Frank Joseph Rosa, Appellant.

(D.C.Crim. No. 75-80)

Appeal From the United States District Court
for the Western District of Pennsylvania

Argued April 6, 1976
Before: Biggs, Gibbons and Hunter, *Circuit Judges.*

Blair A. Griffith, United States Attorney, John W. Murtagh, Jr., Special Attorney, United States Department of Justice, James E. Roark, Asst. United States Attorney, Suite 816, Chatham Center Office Building, Pittsburgh, Pennsylvania 15219, Attorneys for Appellee.

Harold Gondelman, Esquire, Baskin, Boreman, Wilner, Sachs, Gondelman & Craig, 10th Floor, Frick Building, Pittsburgh, Pennsylvania 15219, Attorneys for Appellant Frank Joseph Rosa.

Appendix "A"—Judgment of the United States Court of Appeals for the Third Circuit.

JUDGMENT ORDER

In this appeal from a judgment of sentence following conviction for violation 18 U.S.C. § 1951 defendant Rosa contends (1) that there was insufficient evidence to submit the question of his guilt to the jury on a charge of attempted extortion; (2) that § 1951 does not proscribe attempted extortion, and (3) that the court erred in refusing to relieve him from prejudicial joinder. We find no error.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed. No costs.

For the Court,
JOHN J. GIBBONS,

ATTEST:
THOMAS F. QUINN, *Clerk.*

Dated: Apr 7 1976

APPENDIX "B"

Denial of the Petition for Rehearing

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 75-2382

UNITED STATES OF AMERICA,

v.

FRANK JOSEPH ROSA a/k/a "JOE", JOSEPH SICA, VINCENT MANNELLA,

Frank Joseph Rosa, Appellant.

(D.C. Crim. No. 75-80)

SUR PETITION FOR REHEARING

Present: Seitz, *Chief Judge*, Biggs, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, *Circuit Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

JOHN J. GIBBONS, *Judge*.

Dated: May 3, 1976

APPENDIX "C"

Memorandum Opinion Dated October 29, 1975

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

UNITED STATES OF AMERICA,

vs.

FRANK JOSEPH ROSA, a/k/a "JOE", JOSEPH SICA, and VINCENT MANNELLA,

Defendants.

Criminal Action No. 75-80.

MEMORANDUM AND ORDER.

BARRON P. McCUNE, *District Judge.*

October 29, 1975.

In a two count indictment the United States charged defendants Frank Joseph Rosa, Joseph Sica and Vincent Mannella with violations of the federal conspiracy statute, 18 U.S.C. § 371 (Count 1) and the Hobbs Act, 18 U.S.C. § 1951 (Count 2). The conspiracy count was dismissed on motion of defendants during presentation of the government's case. Trial proceeded under the charge set forth in the second count of the indictment.

At trial, the government's chief witness was Joseph Vacarello, Jr., who was part owner of a family business which did landscape contracting work under the name Penn Landscape and Cement Work. Vacarello testified that on the morn-

ing of July 23, 1974, he received a phone call at his place of business from the office of Vincent Mannella requesting that he come up to Mannella's office, which was located nearby. Mannella, who was a business acquaintance of Vacarella, was the founder and president of Mannella Engineers, a private consulting engineering firm.

Vacarello testified that pursuant to the phone call, he went to Mannella's office where Mannella introduced him to defendants Rosa and Sica, who presented themselves as representatives of unnamed members of the Monroeville Borough Council. At the meeting Vacarello was asked if he had submitted a bid on behalf of Penn Landscape for the construction of a park in Monroeville Borough. When he acknowledged that he had one of the defendants told him: "We would like to see you get the job but we would like a donation." Vacarello was not alarmed since this was not an unusual demand in his line of work. He was also told that he had a problem but he was not made aware of just what that problem was at the morning meeting. He was merely told that Mannella would contact him later that day.

According to Vacarella's testimony, he received a message from his answering service during the afternoon of the same day that Mannella had called. He returned the call whereupon Mannella requested him to come to his office again. Vacarello testified that he did so.

Upon his arrival, and while only he and Mannella were present, Vacarello testified that Mannella told him that the "donation" was to be $10,000.00. His testimony was that he was also told that if he refused to make the donation, he would not get the Overlook Park project on which he was low bidder, or any other work from the Borough of Monroeville. Vacarello also testified that he became aware of his

"problem" at this afternoon meeting with Mannella when Mannella showed him a copy of the minutes of the Borough's Recreation Committee which indicated that he would not be awarded the Overlook Park project.

The jury convicted all three defendants.

Now before the court are post trial motions filed on behalf of defendants Rosa and Sica. Those motions are:

1. Motions in arrest of judgment under Rule 34, Fed. R. Crim. P., in support of which defendants advance two principal arguments, to wit,

(a) that Count II of the indictment fails to charge an indictable offense; and

(b) that the offense of which defendants stand convicted is not the offense charged in the indictment;

2. Motions for judgment of acquittal under Rule 29, Fed. R. Crim. P., in support of which defendants argue that the evidence is insufficient to sustain the convictions as a matter of law; and

3. In the alternative, motions for new trial under Rule 33 alleging trial errors, including, *inter alia:*

(a) denial of defendants' repeated motions for severance under Rule 14, Fed. R. Crim. P., for relief from prejudicial joinder;

(b) the failure of the Court to charge the jury as requested by defendants in certain of their points for charge;

(c) errors within the Court's charge;

(d) error in admission of certain evidence; and

(e) failure to declare a mistrial after improper closing argument by the prosecution.

Appendix "C"—Memorandum Opinion Dated October 29, 1975.

After the careful consideration of the trial record, the briefs of counsel and the points raised at oral argument on the motions, it is the opinion of this Court that all motions should be denied.

I.

The Indictment.

Count II of the indictment charges that defendants

> "did unlawfully and willfully attempt to obstruct, delay and affect interstate commerce . . . by extortion as the term 'extortion' is defined in and by Section 1951, Title 18, United States Code; that is to say the said defendants did wrongfully and unlawfully attempt to obtain property of the value of $10,000 in the form of money from Joseph Vacarello, Jr. as agent and owner of the Penn Landscape and Cement Work with his consent induced by wrongful use of fear in that said defendants did threaten the said Penn Landscape and Cement Work and Joseph Vacarello, Jr., with loss of the 'Overlook Park' project and other contracts unless and until . . . Joseph Vacarello, Jr. paid the defendants the said amount of money."

For purposes of the motions now before the Court, three aspects of the indictment bear emphasis. First, the indictment charges defendants with an unlawful attempt to obstruct commerce "by extortion as the term 'extortion' is defined in and by Section 1951," which is as follows:

> "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right."

18 U.S.C. § 1951(b)(2). Secondly, when the indictment charges the wrongful use of fear, it is fear of economic loss, (see *United States v. Varlack*, 225 F.2d 665, 668 (2d Cir. 1955)), *i.e.*, the loss of contracts, as opposed to fear of physical force or violence against either the intended victim or his property. Finally, it should be remembered that the indictment does not charge the commerce was affected by extortion; it does not charge that the extortion was completed or that commerce was affected in any way. It does not charge that money was actually obtained from the intended victim. What is charged is that defendants *attempted* to obtain money by instilling in the victim fear of economic loss if he refused to accede to the extortionate demand.

With this background, we now consider defendants' contentions *seriatim*.

II.

The Hobbs Act.

18 U.S.C. § 1951, the so-called Hobbs Act, provides:

> "(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose or purpose to do anything in violation of this section [shall be guilty of an offense.]"

It is defendants' contention that while the above-quoted section clearly proscribes any attempt to obstruct, delay or affect commerce (as commerce is defined in the Act, § 1951(b)(3)) by extortion (as extortion is defined in the Act, § 1951(b)(2) *supra*), the language of the Act does not make

criminal an attempt to obstruct, delay or affect commerce by *attempted* extortion when there is no threat or use of physical violence and the indictment charges extortion of the type defined in the Act.[1] Stated otherwise, defendants argue that where, as here, the fear of economic loss is the only force or fear charged in the indictment, then in order for an offense to be made out, the attempted extortion must have been completed, *i.e.*, the victim must have acceded to the unlawful demand.

A. *Is 'Attempted Extortion' a Hobbs Act Offense?*

Since there is no federal common law of crimes, federal criminal law is purely statutory. *United States v. Berrigan*, 482 F.2d 171, 185 (3rd Cir. 1973). Therefore, an attempt to commit a federal offense is itself an offense only when the section defining the offense specifically includes an attempt within its proscription. *United States v. Padilla*, 374 F.2d 782, 787, n.7. (2nd Cir. 1967); *United States v. Joe*, 452 F.2d 653, 654 (10th Cir. 1972); see also Rule 31(c), Fed. R. Crim. P.

Defendants urge that the only crimes established by § 1951(a) are:

1. The obstruction, delay or affectation of commerce or the movement of any article in commerce by

(a) robbery, or

(b) extortion;

2. The attempt "so to do;"

---

[1] Defendants distinguish between extortion as the term extortion is defined by § 1951(b)(2) and "what might be loosely referred to as another extortion provision," that is, committing or threatening physical violence to person or property in furtherance of a plan to do anything in violation of § 1951(a)." See Def. Rosa's Br., at 3.

3. The conspiracy "so to do;" and

4. Committing or threatening physical violence to any person or property in furtherance of a plan to do anything in violation of § 1951.

They argue that the wording of the Act precludes an interpretation which would make it an offense to attempt to obstruct, delay or affect commerce by *attempted* extortion.

The premise for this claim is that the phrase *"attempts or conspires so to do"* as used in the Act refers to interference with commerce and not to the word, extortion. The identical argument was made in *United States v. Tropiano,* 418 F.2d 1069, 1082 (2d Cir. 1969) where the appellants argued that "[T]he Hobbs Act requires proof of completed extortion and if construed to cover attempted extortion, is constitutionally void for vagueness." The Second Circuit rejected this argument:

> "The textual analysis of the statute would clearly embrace an attempt or conspiracy to interfere with commerce by extortion even though the attempt or conspiracy failed because the extortion was uncompleted. *United States v. Pranno,* 385 F.2d 387, 389-390 (7th Cir. 1967), cert. denied, 390 U.S. 944 (1968)."

418 F.2d at 1083.

Defendants have submitted a letter of three language experts which would support their grammatical argument. (See Exhibit "B" to Defendant Rosa's Brief). However, after consideration of the Act's legislative history, its construction by the judiciary in previous cases and the arguments presented here, we are convinced that it was clearly the intent of Congress to punish attempted extortion.

Appendix "C"—Memorandum Opinion Dated October 29, 1975.

1. *Legislative History of § 1951.*

The present § 1951 is derived from the "Anti-Racketeering Act of 1934." *United States v. Varlack, supra,* at 671. Section 2 of the 1934 Act, 48 Stat. 979-980, provided:

> "Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—
>
> (a) obtains or *attempts to obtain,* by the use of or attempt to use or threat to use force, violence or coercion, the payment of money or other valuable considerations . . . or
>
> (b) obtains the property of another, with this consent, induced by wrongful use of force or fear, or under color of official right; or
>
> * * *
>
> (d) conspires or acts concertedly . . . to commit any of the foregoing acts; shall upon conviction thereof be guilty of a felony." (Emphasis added).

After the "restrictive"[2] decision of the Supreme Court in *United States v. Local 807,* 315 U.S. 521 (1942), the statute was amended in 1946 to provide:

> "sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or

[2] In *United States v. Local 807, supra,* the Court declared that certain terrorist activities of various Teamsters Locals were excluded from the scope of the 1934 Act. Congress, evidently believing that the exemption given labor under the 1934 Act was too broad responded with the 1946 amendment which was designed to deter such labor practices. See *United States v. Varlack, supra,* at 669; *United States v. Callanan,* 364 U.S. 587, 590-591 (1961).

commodity in commerce, by robbery or extortion shall be guilty of a felony.

* * *

"Sec. 4. Whoever *attempts or participates in an attempt to do anything in violation of section 2* shall be guilty of a felony." (Emphasis added).

60 Stat. 420.

In 1948 the Act was codified and assumed its present form, 62 Stat. 793 c. 645.

> "Nothing in the legislative history of either the 1946 amendment or the 1948 codification indicates a congressional purpose to effect a change in the 1934 Act in so far as it was aimed at conspiracies to extort or rob or attempts to extort or rob which obstruct, delay or affect foreign or interstate commerce. Moreover, the reviser's notes to Title 18, § 1951 indicate quite clearly that the 'changes in phraseology and arrangement' were designed solely to effect consolidation,"

United States v. Varlack, supra, at 672.[3]

We believe that it is clear from § 1951's legislative history that Congress did not intend to eliminate an attempt to extort

---

[3] The elimination of separate sections for conspiracies and attempts (§ § 3 and 4 of the 1946 Act) and their consolidation with section 2 to form § 1951(a) of the present Act was explained in H.R. 304 (80th Cong. 1st Sess.) (1947), at A131:

> "The words 'attempts or conspires so to do' were substituted for sections 3 and 4 of the 1946 Act omitting as unnecessary the words 'participates in an attempt' and the words 'or acts in concert with another or with others' in view of Section 2 of the Title which makes any person who participates in an unlawful enterprise or aids or assists the principal offender, or does anything toward the accomplishment of the crime, a principal himself."

See also *Callanan v. United States,* 364 U.S. 587 (1961).

from the Act's prohibition. Defendants, citing numerous sections of Title 18, contend that Congress is aware of how to make an attempt a criminal offense which, they argue, was not done here. However, we believe that the present case is but another example of how draftsmen and revisers can create problems as to the meaning of a statute without busy legislators having any idea of what is occurring. See *United States v. Padilla, supra,* at 788 (J. Friendly, concurring).

Defendants seek to invoke the maxim that penal statutes should be strictly construed. However, as stated in *United States v. Padilla, supra,* at 787:

> "But that canon 'is not an inexorable command to override common sense and evident statutory purpose,' *United States v. Brown,* 333 U.S. 18, 25 and does not 'require that the Act be given the "narrowest meaning." It is sufficient if the words are given their fair meaning in accordance with the evident intent of Congress.' " [*United States v. Cook,*] 384 U.S. 257, 262-263 (1966).

While we agree with the observation of Mr. Justice Stewart, in his dissent in *Callanan v. United States, supra,* at 598 that "the relevant section of the Act (§ 1951) . . . is not a model of precise verbal structure," it is evident from the legislative history that it was the intent of Congress to forbid attempted extortion.

2. *Judicial Interpretation of the Hobbs Act.*

As previously mentioned the same argument presented by these defendants was made in *United States v. Tropiano, supra,* the Court, finding that the text of the statute "would clearly embrace an attempt . . . to interfere with commerce by extortion even though the attempt failed because the extortion was uncompleted."

Furthermore, in the recent case of *United States v. Starks*, 515 F.2d 112 (3rd Cir. 1975) the Third Circuit Court of Appeals stated:

> "The Hobbs Act proscribes a number of separate offenses: (1) robbery; (2) extortion; (3) attempted robbery or extortion; and (4) conspiracy to commit robbery or extortion."

515 F.2d at 116. See also *United States v. Jacobs*, 451 F.2d 530, 534 (5th Cir. 1971) *cert. denied*, 405 U.S. 955 (1972).

Defendants, while conceding that the statement in *Starks*, if deemed controlling is fatal to their argument, contend that the above quoted statement is mere dicta since in *Starks*, the attempted extortion had reached fruition. Furthermore, defendants contend that neither the Fifth Circuit in *Jacobs* nor the Third Circuit in *Starks* has truly analyzed the Hobbs Act for the number of crimes created since neither case proceeds to the substantive offense of committing or threatening physical violence to any person or property in furtherance of a plan to violate the Act. See Def.'s br. at 8.

Furthermore, defendants contend that the case at bar is distinguishable from cases cited by the government for the proposition that attempted extortion is a substantive offense. See *e.g.*, *Hulahan v. United States*, 214 F.2d 441, 445 (8th Cir. 1954), *cert. denied*, 348 U.S. 865 (1954); *Anderson v. United States*, 262 F.2d 764, 769-770 (8th Cir. 1959), *cert. denied*, 360 U.S. 929 (1959); *United States v. Green*, 246 F.2d 155 (7th Cir. 1957), *cert. denied*, 355 U.S. 871 (1957); *United States v. Mitchell*, 463 F.2d 187 (8th Cir. 1972); *United States v. Shackelford*, 494 F.2d 67 (9th Cir. 1974), *cert. denied*, 417 U.S. 934 (1974); *United States v. Merry*, 514 F.2d 399 (8th Cir. 1975), and *United States v. Iozzi*, 420 F.2d 512 (4th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971).

Defendants argue that when the courts in the above cited cases refer to a prohibition against attempted extortion, they are not referring to extortion as defined by the Act, but rather to extortion within the substantive offense in the Act, to wit: "whoever . . . commits or threatens physical violence to any person or property . . .," see n.1 *supra.* Defendants argue that since the threat of physical violence is extortion within the Act, the substantive crime is committed by threatening physical violence. Defendants argue that the same is not true in cases of extortion as "defined by the Act" which they argue requires that the property be obtained in order to make out a substantive offense.

We find defendants' argument unpersuasive and hold that the prohibition against attempted extortion applies to cases where extortion "as defined by the Act" is charged. In our view, to adopt defendants' technical argument would ignore the Congressional purpose discerned from the legislative history of the Act.

B. *Were Defendants Convicted of the Crime Charged by the Indictment?*

As a corollary to their principal argument that the Hobbs Act cannot be interpreted to proscribe attempted extortion, defendants argue that the crime of which they were convicted is not the crime charged in the indictment. The assertion is based on the language of the indictment which charges defendants with an attempt to obstruct, delay or affect commerce by extortion, as the term "extortion is defined in and by § 1951." Defendants argue that under the definition of extortion contained in § 1951 (b)(2), the attempt to extort must have been completed. Having rejected defendants' argument that attempted extortion is not a Hobbs' Act crime, *a fortiori,*

we find no variance between the charge in the indictment and the charge of which defendants were convicted.

In short, we believe that defendants were tried only on charges set forth in the indictment as required by *Ex parte Bain*, 121 U.S. 1 (1887) and *Stirone v. United States*, 361 U.S. 212 (1960).

III

Joinder

Among the arguments raised by defendants in support of their respective motions for new trial, only one requires extensive discussion, *i.e.*, whether it was error to deny defendants' repeated[4] motions to sever for relief from prejudicial joinder. We conclude that it was not.

Defendants were properly joined in a single indictment since they were alleged to have participated in the same acts or transactions. *United States v. Starks, supra,* at 116. The question is whether they were properly tried together.

Primarily, for reasons of economy of time in judicial administration, the general rule has evolved that persons jointly indicted should be tried together. This rule has particular strength where, as here, one crime may be proved against two or more defendants on a single set of facts or the same evidence, *United States v. Shuford*, 454 F.2d 772, 775-776 (4th Cir. 1971), and a defendant is not entitled to a separate trial merely because it might offer him a better chance of acquittal.

---

[4] Defendants requested severance prior to trial, during the direct examination of government's principal witness twice (Tr. 144), during redirect examination of government's principal witness (Tr. 247, 264), at the conclusion of the government's case in chief (Tr. 277) and on four other occasions subsequent to having rested (Tr. 322, 323, 349, 363).

See *United States v. Wilson*, 434 F.2d 494, 501 (D.C. Cir. 1970); 8 Moore's Federal Practice, § 14.04[1] at 14-14.2—14-15. But notwithstanding the need for efficiency in judicial administration, a joint trial is inappropriate if it sacrifices a defendant's right to a fundamentally fair trial. *United States v. Shuford, supra*, at 776; *United States v. Echeles*, 352 F.2d 892, 896 (7th Cir. 1965).

Whether or not a severance is to be granted is within the sound discretion of the trial court. *Opper v. United States*, 348 U.S. 84 (1954), *United States v. Stitt*, 380 F. Supp. 1172, 1176 (W.D. Pa. 1974), and involves a balancing [3] of the interests of the public in avoiding a multiplicity of litigation and the interest of the defendants in obtaining a fair trial. 8 Moore's Federal Practice, 14.02[1], at 14-3. Furthermore, in cases of prejudicial joinder, defendant has the difficult burden of demonstrating that he is sufficiently prejudiced by the joinder to warrant severance. As we have said, the determination of the elusive criterion of prejudice rests within the judicial discretion at the trial level, see 8 Moore's Federal Practice, § 14.02[1], and requires a case-by-case determination. *United States v. Echeles, supra*, at 897.

In their post-trial motions defendants argue that the Court abused its discretion in denying their motions to sever. First, defendant Rosa contends that a joint trial allowed prejudicial statements to be elicited by other counsel's examination of the principal government witness:

> "The prejudicial nature of joinder to this defendant is evident from the standpoint of the entire trial. For exam-

[3] In *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970), the Court offers guidelines for evaluating motions for severance based on a desire to offer exculpatory testimony of a co-defendant.

ple, the limited cross-examination of the government witness conducted by counsel for Rosa was expanded by counsel for other defendants to the extent that the witness was finally able, on re-direct examination by the government, to state that he had prepared a written memorandum of the events occurring on July 23, 1974, for the reason that if he disappeared he would want someone to know what had occurred that day. All evidence of lack of fear had been explored and established by counsel for Rosa." (Def's Br. at 16-17).

Second, defendants argue that they were prejudiced by the comments of counsel for co-defendant Mannella to the effect that Mannella would take the stand and testify forthrightly and honestly. In their view, that statement necessarily alluded to the fact that both Rosa and Sica chose to rely on the presumption of innocence and elected not to testify.

Third, Rosa contends that his joint trial with defendants Mannella and Sica was inherently prejudicial because of antagonistic defenses.

Fourth, both defendants contend that they were denied a fair trial (a), by the Court's refusal to allow the cases against them to go to the jury after the government rested and both Rosa and Sica had rested, but before Mannella presented his defense and (b), by the Court's refusal to charge the jury, as requested, that they could not consider evidence which was presented during Mannella's defense in connection with the charges against Rosa and Sica. Defendants argue that these allegedly prejudicial errors could have been avoided by separate trials.

Fifth, defendant Sica contends that a severance was required when his counsel advised the court that co-defendant

Rosa would provide exculpatory testimony on Sica's behalf if either Rosa or Sica were granted a severance, but that he refused to testify and relinquish his right to remain silent during the joint trial.

Finally, Sica contends that his constitutional rights to a fair trial, effective assistance of counsel, due process and compulsory process to secure witnesses in his behalf were abrogated by the court's denial of his motions to sever.

We will deal with each of these arguments *seriatim:*

Defendant Rosa's first contention is that cross-examination of Vacarello by counsel for co-defendant Mannella opened the door for the government, on redirect, to elicit answers which would not have come out at a separate trial, and which were prejudicial to Rosa.[6] We find no merit in this argument. Whether or not Vacarello's statement that he prepared a written memo of the events which transpired on July 23, 1974, (the date of the meeting) so that in the event "[I] would end up missing I would have wanted that to be found . . ."[7] would have come out at a separate trial is purely a matter of speculation. But even assuming that it would not have, its admission was not so prejudicial as to warrant a severance. The jury was instructed that defendants were not charged with any physical force or violence. Furthermore, the mere fact that a defendant would have a better chance of acquittal in a separate trial is immaterial. *United States v. Wilson, supra.* The test is whether "for each of the defendants to see the face of Justice they must be tried separately." *DeLuna v. United States,* 308 F.2d 140, 155 (5th Cir. 1962). In our view, the fact

---

[6] See Transcript. 247-248.

[7] Tr. 242-243.

that the jury was permitted to consider all of the evidence against all of the defendants was entirely proper with the cautionary instruction that each of the defendants was to be separately considered.*

Defendants cite *DeLuna v. United States, supra,* for the proposition that comments by counsel for co-defendant Mannella to the effect that Mannella would testify forthrightly and honestly necessarily prejudiced Rosa and Sica who elected to remain silent as was their right, see *United States v. Housing Foundation,* 176 F.2d 665 (3rd Cir. 1949). In the *DeLuna* case, DeLuna and his cousin Gomez were charged jointly in a two-count indictment with receiving and facilitating the transportation and concealment of a narcotic drug and with purchasing and acquiring a narcotic drug. Like defendants here, both Gomez and DeLuna had their own attorneys and each attorney defended his own client as he saw fit without regard to the interest of the other defendants. At the trial, after Gomez's pretrial motion for severance had been denied, DeLuna did not testify. Gomez, however, did testify and blamed everything on DeLuna. According to Gomez he was an "innocent victim of circumstances."

> "[H]is only connection with the narcotics was when he and DeLuna were riding in Gomez's automobile; DeLuna saw the police coming, tossed a package (the narcotics) to him and told him to throw it out the window. The police saw Gomez throw the package."

308 F.2d, at 141-142.

In closing, counsel for Gomez made repeated comments on DeLuna's failure to testify which were strenuously objected to by counsel for DeLuna. Gomez was acquitted and DeLuna

---

* Tr. 389.

convicted. In reversing DeLuna's conviction the Court of Appeals for the Fifth Circuit held that a defendant's constitutionally guaranteed right to remain silent, free from prejudicial comment, applies to statements by co-defendant's attorney as well as statements by the prosecution or the court. Furthermore, the court felt that instructions by the court that no inference of guilt could be drawn from a defendant's silence were inadequate to neutralize the effect of those comments:

> "But considering the head on collision between the two defendants, the repetition of the comments, and the extended colloquy over the comments between the trial judge and the lawyers, the imputation of guilt to DeLuna was magnified to such an extent that it seems unrealistic to think any instruction to the jury could undo the prejudicial effects of the reference to DeLuna's silence."

308 F.2d at 154. Therefore, the court held that if an attorney's duty to his client requires him to draw the jury's attention to a possible inference of guilt from a co-defendant's silence, the trial judge must order the defendants tried separately to avoid putting "Justice to the task of simultaneously facing in opposite directions." 308 F.2d at 143.

In our opinion *DeLuna* is not applicable to this case since there was no effort by counsel for Mannella to draw the jury's attention to a possible inference of guilt from the failure of either Rosa or Sica to testify. While *DeLuna* clearly stands for the proposition that counsel for Mannella could have done so,[9] the fact is that he did not. Therefore, the statements com-

[9] Judge Bell, in a concurring opinion, argues that counsel should be limited in his comments to statements of the type made by counsel for Mannella here but should not be permitted to go so far as to infer a co-defendant's guilt from his silence. See 8 Moore's Federal Practice, § 14.04[3], at 14-40—14-48.

plained of are, in the words of *United States v. Shuford, supra,* "an oblique reference to defendant's failure to take the stand." 454 F.2d at 779. In *Shuford,* the court specifically rejected the argument of defendant that a statement of co-defendant's counsel, to wit: "Mr. Shuford answered the question in a direct, forthright manner without evasion" 454 F.2d at 779, was prejudicial to defendant. Because defendants here, like those in *Shuford* did not attempt to blame each other, we conclude that defendants suffered no prejudice from the comments complained of.

Furthermore, we agree with Judge Bell's concurring opinion in *DeLuna* where he says that if severance in advance of trial were required where there is a representation to the court that one co-defendant does not expect to take the stand while another or others do expect to testify,

> "This would eliminate joint trials, or vest in the defendant the right to a mistrial during final arguments, or, in the alternative, build in reversible error, all in the discretion of the defendants. The law contemplates no such end."

308 F.2d at 156.

Finally, in the court's charge, the jury was instructed:

> "The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence and a defendant need not testify in his own defense and you may not draw any adverse inference from his failure to do so, that is, the defendant need not testify in his own defense and I repeat that you may not draw any adverse inference against him from his failure to testify."[10]

[10] Tr. 368.

Nor do we find that defendants' claim that joint trial was inherently prejudicial because of the antagonistic defenses of co-defendants has any merit.

> "If all that was necessary to avoid joint trial was a showing of prejudice, there would be few, if any, multi-defendant trials. This is because the very fact of joinder is prejudicial to one or more of the defendants. Thus, the following inherently prejudicial factors do not give rise to severence: that another defendant is charged with more serious offenses, that defenses of co-defendants are generally antagonistic. . ."

8 Moore's Federal Practice, § 14.04[1], at 14-14.1. However, even were we to assume that antagonistic defenses required a severance, see *e.g., DeLuna v. United States, supra,* the defenses in this case were not "antagonistic." See *United States v. Baggett,* 455 F.2d 476 (5th Cir. 1972). We have carefully reviewed the record and fully agree with the government's contention that the net effect of Mannella's testimony was to exculpate all three defendants.

In contrast to *DeLuna,* where the defenses were mutually exclusive, none of the defendants here sought to exculpate himself at a co-defendant's expense. See *Fields v. United States,* 370 F.2d 836 (4th Cir. 1967). We believe that the statement of the court in *United States v. Baggett, supra,* at 478, is also applicable here.

> "All three defendants were charged as to the same events. . . It would not be reasonable to require separate trial merely because the quality of the defense of each defendant might vary, if the defenses do not conflict."

In answer to defendants' fourth argument we believe that both (1), the request to have the cases against Rosa and Sica

submitted to the jury prior to Mannella's defense and (2), the request to instruct the jury that they could not consider the evidence presented in Mannella's defense in connection with the charges against Rosa and Sica were properly denied. In effect, the granting of either request would have amounted to a severence. The indictment in our view charged a joint attempt against all three defendants. It was, therefore, proper that the jury be permitted to consider all the evidence against each of the defendants. The fact that certain portions of Mannella's testimony may have corroborated the government's evidence is immaterial, *United States v. Wilson, supra,* at 501-502, especially in view of the fact that the net effect of his testimony in no was prejudiced the other defendants. The court also instructed the jury that "you should consider each of these defendants separately."[11] The trial strategy employed by counsel for Rosa and Sica whereby neither counsel participated in any cross-examination of defendant Mannella was just that, a trial strategy, and the defendants were not denied an opportunity to do so.

Finally, we reject Sica's argument that a severance was necessary when his counsel advised the court that Rosa would testify on Sica's behalf if a severance were granted. Sica raised his contention that Rosa had testimony exculpatory as to Sica, which Rosa would be willing to testify to in a separate trial, after the United States had rested. The United States submits that raising the issue, after the governmental had rested its case in chief was untimely in view of the fact that Rosa was Sica's son-in-law and the five month interval between indictment and trial. However, since there is no evidence that Rosa's willingness to testify at a separate trial became known to Sica prior to that time, we believe it would

---

[11] 389—Tr.

be improper to base our ruling on that ground since the court has a continuing duty at all stages of the trial to grant a severance if prejudice should appear. *Schaffer v. United States*, 362 U.S. 511 (1960).

In support of his argument, defendant cites *United States v. Gleason*, 259 F. Supp. 282 (S.D. N.Y. 1966), *United States v. Shuford*, 454 F.2d 772 (4th Cir. 1971) and *United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965). In *Gleason*, after a pretrial hearing the court granted severance in an income tax evasion case when the moving defendant made a showing that he needed the evidence of a co-defendant to establish his defense of lack of guilty knowledge. In *Echeles*, the court reversed the conviction of an attorney for suborning perjury and impeding the administration of justice when it found that denial of defendant's motion for severence made him unable to call his co-defendant to the stand for the purpose of getting exculpatory statements into evidence which the co-defendant had made in open court:

> "At this juncture, we hold merely that, having knowledge of Arrington's record testimony protesting Echeles' innocence, and considering the obvious importance of such testimony to *Echeles*, it is error to deny the motion for a separate trial."

352 F.2d at 898. In *Shuford*, the Court of Appeals for the Fourth Circuit held it was error to deny the appellant's motion for severance where "co-defendant had indicated to the trial judge that he would testify if granted a severance and had indicated the precise contents of the expected testimony and its importance."

Thus, in all three cases the defendant presented the trial court with strong reasons demonstrating his need for the testimony of a co-defendant.

In this case, on the other hand, defendant Sica merely represented that Rosa would testify in a manner exculpating Sica if either were served. In *United States v. Kahn*, 381 F.2d 824, 841 (7th Cir. 1967) the court stated:

> "The unsupported possibility that such testimony might be forthcoming does not make the denial of a motion for severance erroneous."

Furthermore, the cases are consistent in their holding that a defendant must make a showing that the testimony would be exculpatory in effect. See, *e.g.*, *Smith v. United States*, 385 F.2d 34, 38 (5th Cir. 1967), *Byrd v. Wainwright*, 428 F.2d 1017, 1020 (5th Cir. 1970), *United States v. Kaufman*, 291 F. Supp. 451 (S.D. N.Y. 1968). That showing was not made here.

IV

Sufficiency of the Evidence

In passing on the sufficiency of the evidence to support a verdict of guilty in a criminal case, the court must view the evidence and reasonable inferences that may be drawn therefrom in the light most favorable to the prosecution and determine as a question of law whether there is substantial evidence, either direct or circumstantial, to support the verdict. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. McClain*, 469 F.2d 68, 69 (3rd Cir. 1972).

In the charge to the jury the court stated that

> "In order to convict Rosa of the charge of attempted extortion you must find beyond a reasonable doubt that:
>
> A. He intentionally went to Mannella's office to participate with Mannella in a plan to obtain money from

Vacarello by the use of threats, specifically, the threat to deprive Vacarello of the award of the Overlook contract or other contracts. No other offense is charged and no other offense may be considered by you.

B. That part of the plan was to be that Mannella was to be the spokesman for him (Rosa) in relating the amount of money to be paid and the threats allegedly stated. And that the second meeting occurred. And Mannella did demand the money and did make the threat.

C. That Rosa intended the threat to be real, that is, serious, and he intended that Vacarello would be frightened by the threat.

D. That Vacarello had a reasonable basis upon which to conclude that the defendants could have prevented him from getting the Overlook contract or other contracts from the Borough of Monroeville.

E. That Vacarello believed the threats, that is, that he was anxiously concerned by them.

F. That if the extortion had been carried out and the $10,000.00 paid, interstate commerce would have been affected.[12]

The Court gave an almost identical charge as to what was necessary to convice defendant Sica. (Tr. 386-387). Also, the court gave a charge on aiding and abetting under 18 U.S.C. §2.

Both Rosa and Sica now contend that the evidence was insufficient as a matter of law to permit a jury to find guilt under the court's charge. We disagree.

---

[12] Tr. 384-385, 404-405.

Appendix "C"—Memorandum Opinion
Dated October 29, 1975.

The government's principal witness, Joseph Vacarello, Jr., testified that he received a phone call on the morning of July 23, 1974, requesting that he come to Mannella's office, which he did. Upon his arrival, Mannella introduced him to defendants, Rosa and Sica. Following the introductions, Vacarello testified:

> "A. ...Mr. Mannella said, 'Did you bid a job in Monroeville?' And I said, 'Yes I did.' 'Well, Overlook Park?' And I said 'Yes,' Then Mr. Sica said, 'We represent several councilmen from the Borough of Monroeville and you are a friend of Vince's and Vince is a friend of yours and we have a problem with the job and we would like to see you get the job but we would like a donation.'
>
> Q. What did you say, sir?
>
> A. I said, 'Okay, fine, depending on what you want.' "[13]

Vacarello said that at the time he had no idea what type of problem Sica was talking about nor what type of donation he was talking about. Later, Vacarello testified that he was told that Vince would call him later, after which he left Mannella's office. Later that same day, Vacarello testified that he received a phone message from his answering service that Mannella's office had called. According to his testimony, when Vacarello returned the call Mannella requested that he come up, which he did. Only he and Mannella were present at this second meeting.

> "Q. What conversation, if any, took place at that time.
>
> A. At that time Mr. Mannella told me what the amount of the donation was, or whatever it was.

---

[13] Tr. 64-65.

Q. What amount did he specify?

A. $10,000.00

Q. What did you say?

A. I was sort of shocked, I says, you know, no way, it is ridiculous.

Q. What did he say?

A. Well, I don't know, let me think a minute here—when he told me $10,000, I says, 'Chirst, that is ridiculous, there is no way it could be paid on a job of this size' and I told Mr. Mannella, he is an engineer, I mean, he knows what things are. I said, 'Who the hell am I supposed to make this check to anyway?' Mr. Mannella said, 'We don't take checks, it is cash in an envelope to me.'

Q. What did you say?

A. I said, 'There is no way that I would pay it.' "[14]

Upon being asked if Mannella told him why he had brought Vacarello and the other two defendants together, Vacarello answered:

"A. Mr. Mannella said that I was apparently angry. He said, 'Look, they are a friend of mine, you are a friend of mine. All I did here, all I am doing is getting you together.' "

* * *

"Q. Did you still at this time, did you have any knowledge of what your problem was?

A. No, I did not.

Q. Did you find out at that meeting with Mr. Mannella what your alleged problem was?

---

[14] Tr. 72-73.

A. Well, at that time at that second meeting, Mr. Mannella showed me the copy of the minutes of a Monroeville committee meeting."[15]

Those minutes rejected Vacarello's bid on the Overlook Park project and Vacarello testified that it was then that he realized what his "problem" was. When Vacarello said, "They do other work in Monroeville," Mannella responded, "Save your time, save your money," or something on that order. Vacarello then left Mannella's office.

The government submits that the evidence clearly established a common scheme, whereby the three defendants, designating Mannella as their spokesman and middleman, attempted to "shake down" Vacarello, and that despite the fact that only Mannella was present at the time of the attempt,[16] defendants Rosa and Sica were equally guilty because of their presence and participation at the earlier meeting.

As previously mentioned, the court instructed the jury under 18 U.S.C. §2, the aiding and abetting statute. This was necessary inasmuch as the jury was instructed that there was no attempt to extort as a matter of law at the morning meeting. Since defendants Rosa and Sica were not actually present at the time of the attempt, they were necessarily convicted as aiders and abettors.

In order to aid and abet another to commit a crime it is necessary that the defendant associate himself with the criminal enterprise, that he participate in it as something which he wishes to bring about and that he seeks by his action

---

[15] Tr. 78.

[16] The jury was instructed that there was no attempt at any extortion at the morning meeting of July 23, 1974, as a matter of law.

to make it succeed. *United States v. Barber*, 429 F.2d 1394, 1397 (3rd Cir. 1970), quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938), quoted with approval in *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). Mere presence at the scene of a crime, even in the company of one or more of the principal wrongdoers, does not alone make one an "aider and abettor," unless the jury is convinced beyond a reasonable doubt that defendant was doing something to forward the crime and that he was a participant rather than merely a knowing spectator. *United States v. King*, 402 F.2d 289, 291 (10th Cir. 1968); see *Hicks v. United States*, 150 U.S. 442 (1893); *United States v. Barber, supra*. Stated otherwise, to convict a person of aiding and abetting, his conduct or other special circumstances attending his presence at a crime must be such as to show that he had associated himself with and participated in the criminal undertaking, and something of significance beyond his mere presence is necessary to justify conviction. *United States v. Barber, supra*, at 1397. Furthermore, in *Barber* the court said that in order to prevent onlookers from being convicted,

> "The courts have responsibility to make sure that mere speculation is not permitted to substitute for proof of group activity in crime."

See *Government of the Virgin Islands v. Navarro*, 513 F.2d 11 (3rd Cir. 1975).

However, an act of relatively slight importance may warrant a jury's finding of participation in a crime. *United States v. Burrell*, 496 F.2d 609, 610 (3rd Cir. 1974). Participation may also be shown by circumstantial evidence as well as by direct evidence, *United States v. Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962). In deciding whether circumstantial evidence supports a conviction the question is whether all the

pieces of evidence against the defendant, taken together, make a strong enough case to let a jury find him guilty beyond a reasonable doubt. *United States v. Pratt*, 429 F.2d 690, 694 (3rd Cir. 1970).

It is essential that the proof against each defendant must be individual and personal, *United States v. DeCavalcante*, 440 F.2d 1264, 1275 (3rd Cir. 1971), *United States v. Klein*, 515 F.2d 751 (3rd Cir. 1975) and mere association with conspirators knowledge of the illegal activity is not sufficient. *United States v. Prince*, 515 F.2d 564, 567 (5th Cir. 1975).

Since defendants Rosa and Sica were not convicted on the basis of their being present at the scene of the crime, (they were not present when the crime was committed) we must decide as to each whether there is evidence, either direct or circumstantial, to support the finding that each was guilty of aiding and abetting in the attempted extortion.

First, as to defendant Sica, the testimony is that Sica was the one who told Vacarello he had a problem and that "we" would like a donation. Furthermore, Sica told Vacarello that Mannella would call him later that day. Sica argues, and we agree, that in order for the conviction to stand it is necessary to infer that Sica appointed Mannella as his spokesman. Sica argues that the evidence was insufficient to go to a jury without accepting a theory of vicarious liability for the phone call, and imputed authority to make the demands. While there is no direct evidence that either Rosa or Sica knew what Mannella was going to say, we believe that by his participation in the earlier meeting Sica *did* associate himself with the criminal enterprise. We believe that there is clearly evidence from Sica's statement that "Vince will call you" that he intended to associate himself with Mannella. We, therefore, reject Sica's argument.

While the evidence against Rosa was not as strong as against the other defendants, it was sufficient to enable a reasonable man to conclude that Rosa was guilty of the offense charged beyond a reasonable doubt. In our view, Rosa's argument is fatally defective in its interpretation of the conclusions which the jury could draw from his presence in Mannella's office during the morning meeting.

Defendant Rosa's argument is that since Rosa did not say or do anything which instilled any fear in Vacarello and since Rosa never demanded or attempted to demand any money from Vacarello, his mere presence at the morning meeting is insufficient evidence as a matter of law of his participation in the attempt to extort. Further, Rosa contends that his presence in Mannella's office at the time of the meeting cannot support the jury verdict finding him guilty of elements "A" through "F" of the court's charge.

We disagree since we find that the jury could conclude on the basis of all the evidence that Rosa had associated himself with the extortion scheme and like Sica, had appointed Mannella as his spokesman. While the evidence of Rosa's participation is entirely circumstantial, it is sufficient to sustain the conviction.

V

Other Claimed Errors

We have carefully examined all other claims of error in defendant's motions and find them to be without merit. In our view, only one of those claimed errors requires discussion, *i.e.*, whether the court committed prejudicial error in allowing Vacarello to testify as to a conversation which oc-

curred subsequent to the attempt between himself and defendant Mannella wherein Mannella asked him: "Did you pay those fellows the $7,500?"[17]

Defendants, citing *Krulewitch v. United States*, 336 U.S. 440, contend that the court erred in permitting Vacarello to testify to that conversation over defendants' objection. They contend that the conversation complained of amounted to a statement by an alleged co-conspirator after the conspiracy **was at an end which *Krulewitch* held could not be used against** the declarant's co-defendants. We disagree.

In the first place, the conspiracy charge was dismissed on defendant's motion prior to admission of the evidence now complained of. Furthermore, we do not believe that the statement is hearsay since it was not offered to prove the truth of the matter asserted but rather to show Mannella's guilty knowledge of an attempt. Under the government's theory wherein Mannella was a spokesman for Rosa and Sica, the statement was likewise admissible against them. *Cf. Anderson v. United States*, 417 U.S. 211 (1974); *United States v. Lutwak*, 344 U.S. 604, 617-618 (1952).

In our judgment, the post trial motions should therefore be denied.

---

[17] See Tr. 135-144.

Appendix "C"—Memorandum Opinion
Dated October 29, 1975.

IN THE UNITED STATES DISTRICT COURT

For the Western District of Pennsylvania

UNITED STATES OF AMERICA,

vs.

FRANK JOSEPH ROSA, a/k/a "JOE," JOSEPH SICA, and VINCENT MANNELLA,

Defendants.

Criminal Action No. 75-80.

ORDER.

AND NOW, October 29, 1975, the post trial motions of defendants, Frank Joseph Rosa and Joseph Sica, in arrest of judgment and of acquittal and for new trial are denied.

All defendants shall appear in Court Room No. 10 on November 20, 1975, at 10:00 A.M., for the imposition of sentence.

BARRON P. McCUNE,
United States District Judge.

cc: Harold Gondelman, Esq.
1018 Frick Building
Pittsburgh, Pa. 15219

Appendix "C"—Memorandum Opinion
Dated October 29, 1975.

Thomas Livingston, Esq.
The Colonial Building
Ross at Second
Pittsburgh, Pa. 15219

Samuel J. Reich, Esq.
Mark Glosser, Esq.
Suite 1112 Frick Building
Pittsburgh, Pa. 15219

John Daley, Esq.
19th Floor, Commonwealth Building
Pittsburgh, Pa. 15222

John W. Murtagh, Jr., Special Attorney
Chatham Center Office Building
Pittsburgh, Pa. 15219

James E. Roark, A.U.S.A.
644 United States Courthouse
Pittsburgh, Pa. 15219

Blair A. Griffith, U.S. Attorney
644 United States Courthouse
Pittsburgh, Pa. 15219

APPENDIX "D"

Memorandum and Order Dated May 19, 1975

IN THE UNITED STATES DISTRICT COURT

For the Western District of Pennsylvania

UNITED STATES OF AMERICA,

vs.

FRANK JOSEPH ROSA, a/k/a "JOE", Joseph SICA and VINCENT MANNELLA.

Criminal Action No. 75-80.

MEMORANDUM and ORDER.

BARRON P. McCUNE, *District Judge*
May 19, 1975.

The defendants have been indicted for alleged conspiracy to violate the Hobbs Act, Title 18, § 1951 (Interference with commerce by threats or violence). Essentially the government contends that the defendants conspired to and attempted to obstruct interstate commerce by attempting to extort $10,000.00 from Joseph Vacarello, Jr.

Several pretrial motions have been filed. All defendants have joined in all motions.

The first is a motion to dismiss because so-called "Strike Force" attorneys presented the case to the Grand Jury pursuant to appointments which were invalid for lack of specificity under 28 U.S.C., § 515(a) and therefore under Rule of Criminal Procedure 6(d) unauthorized persons were in the Grand Jury Room. The defendants also seek an evidentiary hearing of a discovery nature to determine the circumstances under which the appointments were made, the directives of the Attorney General, if any exist, in addition to the letters of appointment; who the attorneys were who appeared before the Grand Jury and all of the inter-office material which the Attorney General has pertaining to the authority of the government attorneys.

The second motion asks the severance of the trial of Mannella from the others because of pretrial publicity which referred to Rosa and Sica as figures connected with organized crime. Three newspaper articles were attached to the motion which refer to Rosa and Sica as members of the organized crime family of John Sebastian La Rocca.

Defendant Rosa moves for a severance for purposes of trial as well because of the danger of the admission of the hearsay statements of alleged co-conspirators during the trial.

At oral argument defendant Rosa also moved for a severance because of the fear of [*Bruton v. United States*, 391 U.S. 123 (1968)] problems. He contends that Mannella's Grand Jury testimony has been given Mannella and he fears that it contains admissions or confessions which, if used, will compromise the other defendants. He has not seen Mannella's testimony but believes the problem to exist.

At oral argument John W. Murtagh, Jr., and James E. Roark appeared representing the government and Mr. Mur-

tagh stated that he had presented the case to the Grand Jury. His letter of appointment was furnished, dated October 2, 1973, executed by Henry E. Petersen, Assistant Attorney General.

The letter has been examined. It is fairly general in tenor and is not unlike the appointment of other so-called Strike Force attorneys which we have seen.

We recently said in ruling on a similar motion in the case of U.S. v. Nemetz, *et al.*, Cr. No. 75-32, that so much had already been written on this subject that it was unnecessary to add to the material.

Defendants argue that the specificity requirements of 28 U.S.C. §515(a)[1] render the appointments void because the letter of appointment is too general. This depends on whether the reader concludes that Congress intended to limit the Attorney General in obtaining help or to assist the Attorney General in getting help when needed. The great weight of authority adopts the view that Congress intended to permit the Attorney General to get all the help he required and he was therefore authorized to specially appoint attorneys and to specifically direct them to function in a broad field. See *U.S. v. Brown*, Cr. No. 74-867 (S.D. N.Y., filed February 24, 1975), 16 CrL 2504, March 12, 1975.

The last opinion on this subject available to us in an opinion of April 22, 1975, in the District Court for the District of Rhode Island, Misc. No. 75-86, captioned: "In Re: Grand Jury Subpoenas addressed to Raymond L. S. Patriarca et al." We agree with what was said there.

---

[1] 28 U.S.C. 515(a) provides, *inter alia:* "The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding . . ."

Appendix "D"—Memorandum and Order Dated May 19, 1975.

We find it unnecessary to furnish discovery to defendants concerning the Attorney General's directives or his inter-office practices or what he may have told Murtagh respecting his authority.

The motion to dismiss because of the alleged violation of Rule 6(d) of the Criminal Rules will be dismissed.

With respect to the second motion that we sever Mannella's trial because of pretrial publicity, we believe it wise to await *voir dire* to determine whether the publicity makes the granting of this motion proper so it will be denied as well.

The motion of Rosa that we sever his case for trial because of the danger of the admission of the hearsay statements of alleged co-conspirators during the trial will be denied also.

This leaves pending the motion that the trials be severed because of the possibility of *Bruton* problems because of what Mannella may have said to the Grand Jury. Government counsel states that there are no *Bruton* problems but defense counsel suspect they exist. We have no way of knowing the answer to this short of looking at the transcript of Mannella's testimony or of ordering it displayed to all defense counsel. The latter course is unwise because Mannella may not wish to reveal the testimony.

We are willing to examine that testimony *in camera* provided all parties, including the government, consent. However, we do not require this action. We believe it would be just as wise to proceed to trial believing that government counsel will not create a problem so well warned of in advance of trial.

Therefore, the motion to sever because of a possible *Bruton* problem is denied. However, it will be reconsidered in the

event defendants and the government present the Mannella transcript within 10 days from the date hereof along with a renewed motion.

The trial of this case will begin at 10:00 A.M., June 23, 1975, in Court Room No. 10.

It is so ordered.

BARRON P. McCUNE,
United States District Judge.